1 April 1982

1. LBS

2. PAD - please keep on file.

Judy

DX-4

File

D/OEXA

FYI only

The Reagan Administration and Intelligence:

Some Preliminary Judgments on the Public Record

Remarks

of

John H. Shenefield
Milbank, Tweed, Hadley & McCloy

STAT

at

Conference

on

The First Amendment and National Security

St. Thomas, Virgin Islands
January 8, 1982

The Reagan Administration and Intelligence: Some Preliminary Judgments on the Public Record

Almost precisely one year has now passed since President Reagan took office. As is customary at this point in any new Administration, the press has been issuing a series of "report cards" on the performance of the President and his appointees. In fact, the Administration recently went so far as to issue a report card on itself. Not surprisingly, it gave itself high grades.

These year-end assessments, whatever their source, can serve a constructive purpose. They help to hold elected officials and their appointees to the public expectations created during the previous campaign. They can also encourage mid-course corrections where mistakes have been made. With these positive purposes of the exercise in mind, I would like to spend the next few minutes issuing my own report card on the Reagan Administration's record on issues pertaining to intelligence.

In doing so, I will necessarily be limited to the public record of the Administration's actions. This is a serious limitation in discussing a subject that, by its nature, must be handled largely out of the public view. But

I will be aided by my own experiences dealing with intelligence issues in the Carter Administration. I came away from that experience more firmly convinced than ever of the importance of the intelligence enterprise for the well-being of the United States. Put simply, our national security demands that we have the best intelligence system in the world. That is the first major proposition. The second is this: in building and maintaining that capacity, we must work within the legal, political and moral framework defined by what makes our country unique. That discipline -- tension, if you will -- makes intelligence issues conceptually and practically difficult. Our experience points to the futility of seeking simple solutions to the problem of balancing national security and individual rights. There are no simple solutions.

I must begin by confessing that I was concerned at the time the Reagan Administration took office about some of the rhetoric that the President and his supporters had used on the subject of intelligence. The reason was that I had broken my own rule on the credibility quotient in campaign speeches. If some conservative politicians and activists were to be believed, the Carter Administraiton had systematically choked off every legitimate source of

intelligence useful to the government. It had done so by imposing totally illogical rules and regulations on the intelligence community that exponentially increased the problems of intelligence professionals. Ostensibly, for instance, we had also refused to make any use of covert action even in the most demanding of circumstances, thereby depriving the United States of an important weapon in world affairs.

As anyone familiar with the facts knows, these charges are pure nonsense.

President Carter's Executive Order 12036 on intelligence activities built largely on the foundation laid in the Ford Administration in Executive Order 11905. The procedures promulgated under the Carter order similarly built on the traditions that had already been established under the previous Administration. Both the order and the procedures placed controls on the collection of only a minute portion of the universe of intelligence information. That is, the rules dealt almost exclusively with how and when information could be collected from or concerning United States citizens. They did not place any significant restrictions of any kind on collecting information about Soviet citizens or Libyan terrorists, for instance.

Therefore, it is absurd to blame these rules for intelligence shortcomings in foreign countries. The real targets of any aggressive U.S. intelligence agency must be in foreign governments and organizations. The kind of restrictions that have been imposed to date simply do not go the heart of much of the agencies' work.

As far as the use of covert aciton is concerned, I assure you that this tool was not abandoned. Its use was careful, calculated, and judicious; indeed, the popular perception of its neglect is a perverse confirmation of the successful manner in which it was employed, for this is a technique of state-craft that succeeds only to the extent that it remains secret. The fact that there is so little on the public record about the use of covert action in the Carter Administration proves only that these matters were kept secure.

I do not mean to suggest that Executive Order 12036 and its related procedures, or the Carter Administration's use of covert action, were perfect in all details. Some of the procedures were indeed lengthy and perhaps too complex for practical purposes. Consequently, while I was concerned at the time President Reagan took office that he might heed some of the ill-informed advice he was receiving and simply

abandon the legal framework that had governed U.S. intelligence activities for several years, I was pleased that he was also committed to remedying some of these flaws.

Viewed on this background, several aspects of the Reagan Administration's record deserve approval and applause. However reluctantly, the Administration did take almost a full year to draft, redraft, and redraft again its Executive Order 12333. Although some may have found the passage of time a cause for criticism, I believe it reflects a process of careful deliberation that should be encouraged. Sound legal regulation of intelligence does not lend itself to snap judgments. The product that finally emerged is a relatively moderate document, which continues the important tradition of building on its predecessors. Lest I offend those in the current Administration who wish to believe that they are making a revolution that has no historical antecedents, I should add that the order certainly is more conservative than its predecessors in the sense of according greater discretion to the intelligence community in the performance of its work. Nevertheless, by and large this order recognizes the strengths of the orders issued in the two prior Administrations, and avoids the destructive impulse simply to negate everything that went before.

As an example, I would cite the order's provisions pertaining to the Attorney General's intelligence responsibilities. The creation of an active role for the Attorney General in the review and legal analysis of intelligence activities touching on individual rights was one of the most important reforms established in the Ford and Carter orders. It is, perhaps, the most important procedural aspect of either of those orders. The elimination or significant reduction of the Attorney General's role would have signaled a major retreat in the government's commitment to the protection of individual rights.

With one important exception, which I will discuss in a few moments, the Reagan order avoids taking that retreat. For instance, the order provides that all of the most intrusive investigative techniques are to be used only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General; the Attorney General himself is delegated the power to approve, on a case-by-case basis, the use of those techniques for which a warrant would be required if undertaken for law enforcement purposes. Employees of the intelligence community remain obligated to report to the Attorney General

violations of federal criminal laws. The order also gives the Attorney General the right to participate in certain advisory groups to the Director of Central Intelligence; to approve procedures for use; in the collection of criminal narcotics intelligence activities abroad; to participate in the drafting of procedures for the conduct by the Secret Service of activities designed to counter surveillance against the President and others; and to take part in the drafting of procedures for Department of Defense coordination with the FBI in the conduct of counterintelligence activities in the United States. Very importantly, the order contains the statement that the FBI is to conduct its intelligence activities under the supervision of the Attorney General, and pursuant to such regulations as he may establish.

Moving beyond the Executive Order, there is more in the Administration's record that deserves praise. The Administration has moved swiftly to secure the enactment of legislation that would punish disclosures of the identities of U.S. intelligence agents by persons of ill-will who have a self-appointed mission to destroy U.S. intelligence capabilities. The adoption of such a law is long overdue. The Administration also deserves plaudits for its

forthrightness in efforts to shield the intelligence community from the adverse effects on intelligence-gathering of the Freedom of Information Act. I do not necessarily endorse all the details of the FOIA proposals, but their general thrust is in the right direction.

I would add to the list of positive accomplishments by this Administration the reestablishment of the President's Foreign Intelligence Advisory Board. This collection of distinguished Americans has much wisdom to lend to the intelligence community; I have always felt that its abolition in the Carter Administration was a mistake. In addition, some of the President's appointments to high-ranking positions in the intelligence agencies -- and I emphasize the word "some" -- have been excellent, indeed among the very best in our national security apparatus.

Last but not least, the Administration deserves some praise for certain steps that it has not taken, despite the urgings of some of its supporters. The President has not simply given carte blanche to the intelligence community to target Americans for intrusive investigations, as some had wished; he has preserved the principle that intelligence must be subject to the rule of law. As an example, there is no indication that the Administration intends to propose the

repeal of the Foreign Intelligence Surveillance Act, establishing a judicial warrant requirement for electronic surveillance conducted for intelligence purposes. This is a fortunate development; the Act is one piece of legislation that, as I know from personal experience, has worked exceedingly well. That opinion is shared by others who have worked with FISA at first hand, including the Director of the FBI.

Ultimately, though, this Adminstration, like its predecessors, cannot be judged by the undesirable things it has declined to do; it must be judged instead on its affirmative agenda for intelligence. For all the positive developments that I have listed, a disturbing list of countervailing minuses must be acknowledged. There is one striking aspect common to each of the missteps that we have witnessed to date: each seems to reveal an affinity for symbolic actions apparently designed to express faith in the intelligence community, but nevertheless accompanied by insufficient attention to substantive effects. Now there is nothing wrong with symbolic acts. They can be very important. But symbolism rarely overwhelms substance, and when the adverse effects are important, there are usually other symbols that would serve as well.

First, and most fundamentally, the rhetoric that raised expectations in the intelligence community of a radical revision, or even abolition, of the executive order and procedures governing intelligence activities did no service to the public interest. Since 1975, when the Congressional investigations of intelligence were at their height, we have had three Presidents. We have also had three executive orders and, presumably, three sets of implementing guidelines under which the intelligence community has been required to function. It would be extremely unfortunate to develop an extectation that, each time there is a change of Administration, there will be such basic changes in the rules of the intelligence profession.If we are to give our intelligence employees confidence that they are acting within the law when carrying out their assignments, we must have some stability in the rules that apply. There were certainly flaws in the Carter order and the accompanying procedures, but they were not fundamental. Indeed, the vast similarities that finally have emerged between the text of President Reagan's order and its predecessor testify to the essentially sound provisions of the predecessor. In this situation, the most constructive cause of action for the new Administration would have been

to announce a series of perfecting amendments to the Carter order, and to the procedures promulgated under it. By entirely redrafting that order, and thus necessitating a lengthy and difficult process of redrafting all the implementing procedures, the Reagan Administration has upset what was becoming a series of settled and comfortable practices worked out between the intelligence agencies and the Department of Justice on matters as to which the law is unclear or unsettled.

Even if the kind of radical surgery performed by this Administration were necessary, many questions remain about the specific content of the resulting order. I know that we will be discussing the order in detail over the next several days. Let me concentrate on one example of a flaw that I consider quite serious.

I mentioned earlier the importance of the Attorney General's role in reviewing intelligence activities and the rules for their conduct. Although that role is preserved in many sections of the order, it is seriously undermined by one additional, and new, provision.

Although it is not generally known, there have been a number of instances under Executive Orders 12036 and, I assume, 11905 in which heads of intelligence agencies have

submitted for the Attorney General's approval procedures required to be promulgated under one of those orders, but which the Attorney General has not found acceptable. Without the Attorney General's approval, of course, the procedures can never go into effect, which leaves the proposing agency in the highly undesirable posture of having to conduct legally sensitive operations with insufficient guidance and authority.

In general, these disagreements between the Attorney General and heads of intelligence agencies arise in one of three contexts. First, the Attorney General may simply feel that the procedures do not conform to constitutional, statutory or other legal standards. In such cases, the Attorney General must entirely withhold his approval. Second, the Attorney General may believe that the law pertaining to the activity governed by the procedures is so unclear that a period of experience and experimentation is necessary before he can lend the full weight of his authority to the approval. In such cases, the Attorney General may limit his approval to a specific period of time or, in the alternative, he may approve the procedures with conditions that certain reports be made to him on the details of operations under the procedures. Third, the

Attorney General may be concerned that procedures proposed by another agency trespass upon the authority and responsibility of the FBI. In such cases, the Attorney General must function not only as a dispassionate legal advisor to the proposing agency, but also as defender of the agency over which he has ultimate managerial as well as legal authority. In this case, defending the Attorney General's turf has more than bureaucratic importance. Maintaining a relatively sharp division between the primarily domestic jurisdiction of the FBI and the primarily foreign jurisdiction of the CIA, for example, has long been a goal of U.S. public policy.

Section 3.2 of the Reagan order imposes two unprecedented requirements on the Attorney General. First, he is required to provide a statement of reasons for not approving any procedures established by the head of an agency in the intelligence community other than the FBI. On its face, this requirement does not appear unreasonable, until one considers its lack of even-handedness. No other official of the intelligence community is required to provide any statement of reasons for failing to promulgate procedures that meet the legal standards articulated by the Attorney General. More importantly, however, the order

provides that "where the agency head and the Attorney General are unable to reach agreement on other than constitutional or other legal grounds," the National Security Council may establish procedures on its own.

I am deeply concerned that this provision will erode the Attorney General's authority in two of the circumstances I have mentioned. First, if the Attorney General is convinced that the law is too unsettled on some questions to permit final approval of procedures, then arguably he has no definite "constitutional or other legal grounds" for withholding his signature. Is the National Security Council then empowered to resolve serious legal doubts without the Attorney General's concurrence by establishing procedures on its own? Similarly, when the Attorney General is concerned primarily with protecting the bureaucratic jurisdiction of the FBI, will the question now be exclusively one for the NSC? Let me remind you that the Attorney General is not a member of that group, while the Director of Central Intelligence is. Thus, we are faced with the propsect of the National Security Council's overturning the Attorney General's decisions in his absence. The ominous implications of this possibility are confirmed by the fact that § 1.3(b) of the order specifically

authorizes the exclusion of the Attorney General, among others, from NSC groups that deal with "substantive intelligence matters." That term is not defined anywhere in the order. Obviously, it leaves considerable room for interpretation.

It may be that any Attorney General worth his salt will always be able to find some legal peg to hang his hat on when refusing to approve intelligence procedures, or when approving them subject to the fulfillment of certain conditions. But I doubt that we should encourage the Attorney General to concoct legal theories in situations where the government would be far better served by his honest expression of the uncertainties inherent in the law, or by a classic defense of his bureaucratic turf.

The derogation from the Attorney General's authority that is contained in the executive order is accompanied by a diminution of the jurisdiction of the Intelligence Oversight Board. As most of you know, that three-member board, established by President Ford, had jurisdiction until recently to investigate intelligence activities that raised questions of law or propriety. Obviously, identifying "improper" intelligence activities can be a difficult task, but doing so was an important part

of the IOB's responsibilities. The Attorney General, after all, has full responsibility and authority to investigate alleged unlawful intelligence activities. The IOB, which historically has had a full-time professional staff of one lawyer, could never hope to compete with the Attorney General in ferreting out violations of the law. The Board's unique contribution came in helping to identify those activities that might cause public concern, even if not clearly prohibited by the applicable rules of law.

The Administration has stripped away the IOB's jurisdiction over improper activities, and has limited its responsibility to investigation of activities that are believed to violate the Constitution or laws of the United States, executive orders, or Presidential directives. This change transforms the IOB into a largely redundant institution. I believe that the government is the worse off for the loss of the IOB's broader mandate, which still, so far as I can determine, awaits public explanation. In the absence of such an explanation, I can only theorize that the intention was somehow to send a message of support to the intelligence community. If so, the symbolic action has been taken at the cost of the merits of the IOB's activities.

The apparent attraction of highly symbolic actions that bring few substantive advances and may curtail disadvantages in the long run for the cause of U.S. intelligence is reflected in three additional steps that the Administration has taken.

On April 15, 1981, President Reagan granted unconditional pardons to two former FBI officials, W. Mark Felt and Edward S. Miller, who had been convicted of conspiring to deprive citizens of their Fourth Amendment rights. In granting the pardons, the President stated that he was acting because Felt and Miller had "acted not with criminal intent, but in the belief that they had grasped authority reaching to the highest levels of government." These issues had been put directly to the jury in the case, which necessarily had found to the contrary. The President offered no explanation of why he felt justified in contradicting the unanimous findings of the jury that, beyond a reasonable doubt, Messrs. Felt and Miller indeed acted with criminal intent. Moreover, apparently the Justice Department was not even consulted on the matter, although that would certainly be the normal procedure in granting any pardon.

The Committee on Criminal Law of the Association of the Bar of the City of New York succinctly stated the implications of this action: "The President's impeachment of the jury verdicts in this case without specifying reasons for doing so and his failure to comply with procedures normally followed in granting pardons will inevitably send a clear message to law enforcement officials that the executive is prepared effectively to immunize from punishment those officials who commit unlawful acts but whose aims are in accordance with their view of the 'national security'". I agree with the City Bar that little that is constructive can come out of these pardons timed and explained as they were. Perhaps pardons at some point were in order. But the pardons certainly could not be justified in terms of avoiding deterrence to aggressive intelligence activity. With executive orders and intelligence procedures on the books, there is no reason today why any intelligence agency employee should face serious ambiguity as to whether a search is properly authorized and in accordance with the rules for national security investigations. Therefore, little deterrence to aggressive intelligence collection was likely to result from the Felt-Miller convictions. Instead, lack of respect for the rules is, I am afraid, likely to

result from the pardons justified as they were. In short, here is a case in which the symbolism is all the wrong way.

Critics of the rules adopted to govern intelligence collection in recent years have often argued that those rules destroy the operational flexibility necessary to successful information gathering. In one recent action, however, the Reagan Administration has managed to deprive itself and its successors of some existing flexibility in the legal standards pertaining to one of the most intrusive collection techniques, physical searches. On three occasions, the Justice Department in the Carter Administration convinced the Foreign Intelligence Surveillance Court, established pursuant to the Foreign Intelligence Surveillance Act, to issue orders authorizing certain physical searches to be conducted for intelligence purposes. Previously, these searches had been conducted solely under the inherent authority of the President, as delegated to the Attorney General. The orders were sought and obtained from the court on the theory that, while the executive branch was not required to seek judicial approval of the use of this investigative technique, it has discretion to do so. When this discretion was exercised,

the court, it was argued, had inherent authority to issue the requested order.

Under these theories, which the court apparently accepted, the executive branch enjoyed the best of all worlds. It had the option of seeking judicial sanction for physical searches, and in doing so, reinforcing the contention that such searches were reasonable under the Fourth Amendment because they had been scrutinized by an impartial magistrate. At the same time, if any reason suggested itself as to why such an approach to a court was impracticable, nothing required the executive to seek an order.

Curiously, the new Administration was not content with this state of affairs. It applied to the court for an order authorizing a fourth physical search, but accompanied the application with a memorandum of law arguing that its own application should not be granted because the court lacked authority to issue it. On June 11, 1981, the court granted the government's wishes, by holding that it lacked the authority to issue the order ostensibly requested.

This result is unfortunate from several points of view. It has the effect of binding the Reagan Administration's successors; an approach to the court will

now be impossible unless new legislation reverses the court's decision. This is in contrast to the flexible posture in which the court's earlier rulings left the government, which gave each Administration the option of setting its own policies on approaching the court.

In creating these new rigidities, the Administration has also undermined the credibility of the Foreign Intelligence Surveillance Court itself. The submission of the physical search application that led to the Court's order of June 11 was a sham. In what other court would any lawyer dare to file a motion for the purpose of provoking its denial? The courts should not permit themselves to be manipulated in this manner. The Foreign Intelligence Surveillance Court has been made to seem the puppet of whichever Administration's representatives are appearing before it, despite the fact that the entire reason for its creation was to assure impartial, independent review of executive branch actions. Worse, nothing has been gained for intelligence operatives that they did not already possess, namely, the flexibility to operate without a warrant. One wonders, therefore, what possessed the Administration to take this approach. If in its judgment the Administration had concluded that the better practice

was to proceed on the basis of executive branch authority without the involvement of the FISA court, it would have been preferable to do just that - without inviting the court to rule on its own authority, or lack of it. Now, a different Administration will have a heavy burden of reversing precedent if it comes to a different legal conclusion.

The Administration also made a serious misjudgment by revoking guidelines that were issued by the Justice Department in 1980 to govern lawsuits to enforce secrecy agreements signed by intelligence agency employees. As most of you recall, the Supreme Court held in Snepp v. United States that the government could impose a constructive trust on profits from publications written by intelligence agency employees in violation of their fiduciary obligations to the government. The opinion contained broad language to the effect that such remedies might be available even where no explicit written agreement existed, and even outside the sphere of national security; there is also language in the opinion indicating that prior restraints against publications might be freely available where a fiduciary obligation was found to exist.

The issuance of the Justice Department guidelines was prompted by the seriousness of the First Amendment concerns that permeate any attempt to restrain publications. The guidelines, which were adopted only after full consultation with the intelligence community and extensive revision as a result, set forth a list of criteria that staff lawyers in the Department of Justice were to consider in making recommendations to the Attorney General as to whether particular Snepp-type suits should be filed. The questions to be addressed in recommendations to the Attorney General included whether the person publishing was aware that he was subject to a fiduciary obligation or had willfully violated it, as well as the degree of harm to the national security that could reasonably be expected to result from the publication. Virtually nothing in the guidelines restricted the Attorney General's own discretion to file suit. The guidelines were merely an attempt to spell out for the public the kinds of information that would be considered by the Attorney General in exercising his prosecutorial discretion, so that some confidence could be established that the vast powers conferred on the Attorney General by the Snepp decision would be exercised in a cautious and reasonable way.

Despite the fact that the guidelines placed no restrictions on his own freedom of action, the current Attorney General saw fit to wipe them off the books. By doing so, he has not expanded his or the government's powers to protect intelligence sources or methods by one centimeter beyond those available while the guidelines were in effect. He has only succeeded in making his authority less consistent and less accountable. Again, I fail to see any convincing rationale, other than an empty desire for symbolic actions perceived as "pro-intelligence," that justify the Attorney General's steps. I am convinced that, in the long run, unaccountable power is more vulnerable to political attack than power exercised on the basis of a reasonable, articulated rationale, and that therefore the revocation of the guidelines was not truly "pro-intelligence" at all.

Let me conclude by attempting to weigh the positive accomplishments against the shortcomings of the Reagan Administration's public record on intelligence. I have argued that whatever may ail our intelligence system, the rules concerning collection of intelligence about Americans are a very minor part of the disease. Therefore, although the new executive order is, in many respects, a reasonable

document, it remains a form of radical therapy for a minor ill. Like the Felt-Miller pardon, the Foreign Intelligence Surveillance court application on physical searches, and the revocation of the Snepp guidelines, issuance of an entirely new executive order represents an attempt to fix many things that were not broken. In doing so, the Administration has renewed instability in the rules for intelligence collection and created unfortunate implications for observance of the law, while actually decreasing both the flexibility and the accountability of the executive branch. Therefore, while acknowledging some substantial accomplishments, I cannot give the Administration a high grade for its efforts up to now. I hope that in the Administration's future actions, substance will prevail over symbolism more consistently than it has to date. It is my hope that the kind of dispassionate analysis occurring at this conference will contribute to such a turn of events.